No. 82-1399

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

DONALD A. ALESSI and JOHN P. BARTOLOMEI,

Petitioners,

—v.—

COMMITTEE ON PROFESSIONAL STANDARDS,
THIRD JUDICIAL DEPARTMENT,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Donald A. Alessi and John P. Bartolomei respectfully petition for a writ of certiorari in this case to review the judgment of the Court of Appeals for the State of New York.[1/]

QUESTIONS PRESENTED

1. May a state, consistent with the First Amendment and this Court's decisions on lawyer advertising, discipline attorneys for mailing to real estate brokers in their vicinity a truthful and non-misleading announcement of their availability to handle real estate matters?

2. May a state, consistent with the Due Process Clause of the Fourteenth Amendment, discipline attorneys for violating a state statute which purports to ban all lawyer

1/ Henry Pedicone, Jr. and Linda Zablotny, who were named as co-respondents in the original misconduct petition filed by the grievance committee, did not pursue an appeal to the New York Court of Appeals.

advertising which can be "constitutionally proscribed," and which therefore provides no actual notice of what conduct is forbidden?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I. THE DECISION BELOW CREATES A CONFLICT WITH THE DECISIONS IN OTHER STATES	14
II. THE DECISION BELOW REPRESENTS AN UNCONSTITUTIONAL ABRIDGEMENT OF FREE SPEECH AND IS INCONSISTENT WITH THE PRINCIPLES GOVERNING ATTORNEY ADVERTISING WHICH THIS COURT HAS PREVIOUSLY ENUNCIATED	17
III. THE DECISION BELOW OFFENDS DUE PROCESS BY UPHOLDING A DISCIPLINARY SANCTION BASED ON A STATE STATUTE WHICH PROVIDES NO NOTICE OF WHAT CONDUCT IT PROSCRIBES	24
CONCLUSION	29
APPENDIX	1a

Page

Decision of the Court of Appeals for the State of New York, November 18, 1982.....1a

Order of the Appellate Division of the State of New York, Third Department, August 3, 1982.....2a

Decision of the Appellate Division of the State of New York, Third Department, June 22, 1982.....5a

Order of the Appellate Division of the State of New York, Third Department, January 15, 1982.....8a

Decision of the Appellate Division of the State of New York, Third Department, January 15, 1982.....10a

Answer to Misconduct Charges, April 9, 1982.....11a

Petition Charging Misconduct, April 22, 1981.....17a

Text of Letter Mailed by Petitioners.....23a

Grievance Commission of the Board of Overseers of the Maine Bar, Opinion No. 16 (1980).....25a

Oregon Legal Ethics Opinion Number 431, Guideline No. 15 (1980).....34a

Page

New Jersey Advisory Committee
on Professional Ethics,
Opinion No. 468 (1981).....35a

Illinois State Bar Association,
Committee on Professional Ethics,
Opinion No. 749 (1981).....41a

Disciplinary Rule 2-101.....47a

Disciplinary Rule 2-104.....53a

TABLE OF AUTHORITIES

Cases — Page

Bates v. State Bar of Arizona, 433 U.S. 350 (1977).....passim

Central Hudson Gas & Electric Company v. Public Service Commission, 447 U.S. 557 (1980).....19

Champlin Refining Co. v. Corp. Commission of Oklahoma, 286 U.S. 210 (1932).....26

Committee on Professional Standards v. Alessi, 88 A.D.2d 1089 (Third (Dept. 1982).....1

Connally v. General Construction Co., 269 U.S. 385 (1926).....27

Grayned v. City of Rockford, 408 U.S. 104 (1972).....27

Greene v. Grievance Committee, 54 N.Y.2d 140, cert. denied, ___ U.S. ___, 72 L.Ed.2d 153 (1982).....passim

In the Matter of R.M.J., 455 U.S. 191 (1982).....passim

Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978).....14, 23

Koffler v. Joint Bar Association, 51 N.Y.2d 140, cert. denied, 450 U.S. 1026 (1981).....6

Matter of Discipline of Appert, 315 N.W.2d 205 (Minn.Sup.Ct. 1981)..15

Page

Matter of State Bar Grievance Administrator v. Jacques, 407 Mich. 26 (1979)..... 14

Ohralik v. State Bar Association, 436 U.S. 447 (1978).....10, 20, 22

Speiser v. Randall, 357 U.S. 513 (1958)..... 22

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).....12, 23

Statutes and Rules

28 U.S.C. §1257(3)..... 1

New York State Judiciary Law §479.....1, 4, 13, 26

New York State Code of Professional Responsibility

Disciplinary Rule 2-101.....2, 3

Disciplinary Rule 2-103(A)..... 2

Disciplinary Rule 2-104..... 2

Ethical Consideration 2-7..... 11

Miscellaneous Authorities

Grievance Commission of the Board of Overseers of the Maine Bar, Opinion No. 16 (1980)..... 15

Page

Illinois State Bar Association, Committee on Professional Ethics, Opinion No. 749 (1981).....16

New Jersey Advisory Committee on Professional Ethics, Opinion No. 468 (1981).....16, 17

Oregon Legal Ethics Opinion Number 431, Guideline Number 15 (1980).....16

OPINIONS BELOW

The decision of the New York Court of Appeals (App. at 1a) was issued without opinion and is not yet reported. The opinion of the Appellate Division finding petitioners guilty of professional misconduct (App. at 5a-7a) is reported at 88 A.D.2d 1089 (3d Dept. 1982). The opinion of the Appellate Division denying petitioners' motion to dismiss (App. at 10a) is not reported.

JURISDICTION

The judgment of the New York Court of Appeals was entered on November 18, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(3).

STATUTES INVOLVED

New York State Judiciary Law §479 provides:

> It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business,

> or to solicit or procure through solicitation or retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so to solicit or procure such business, retainers or agreements.

Disciplinary Rule 2-103(A) of the Code of Professional Responsibility adopted by New York State provides:

> A lawyer shall not solicit employment as a private practitioner of himself or herself, a partner or an associate to a person who has not sought advice regarding employment of a lawyer in violation of any statute or court rule. Actions permitted by DR 2-104 and advertising in accordance with DR 2-101 shall not be deemed solicitation in violation of this provision.

DR 2-104 and DR 2-101 are set forth in full in the Appendix. (47a-54a).

STATEMENT OF THE CASE

Petitioners Donald Alessi and John Bartolomei have been licensed attorneys in New York State since 1970 and 1980, respectively. (17a-18a). In 1979, both petitioners were

partners in the Legal Clinic of Cawley and Schmidt. During August and September of that year, the Clinic mailed approximately 1,000 letters to local realtors in the Albany area advising them that Cawley and Schmidt was available to handle "all aspects (buy or sell) of residential real estate transfers." The letter was not written by either petitioner. However, Alessi and Bartolomei reviewed and approved the letter before it was mailed. (19a).[2/]

In accordance with the guidelines for attorney advertising set forth in New York's Code of Professional Responsibility,[3/] the letter described the Clinic's basic fee schedule. Its simple text was truthful, informative and not misleading in any fashion.

Yet solely on account of this single

2/ The full text of the letter is reprinted in the Appendix at 23a-24a.

3/ See DR 2-101. (47a-52a).

letter, petitioners were charged with professional misconduct for violating §479 of New York's Judiciary Law and parallel provisions contained in New York's canon of ethics. (17a-22a). Petitioner's motion to dismiss those charges as a violation of the First Amendment was denied by the Appellate Division (8a-10a), which relied on a decision by the New York Court of Appeals rejecting a similar claim in Greene v. Grievance Committee, 54 N.Y.2d 118 (1981), cert. denied, ___ U.S. ___, 72 L.Ed.2d 153 (1982).

After the denial of their motion to dismiss, petitioners submitted a formal answer to the charges against them in which they again asserted that the letter mailed by the Clinic to real estate brokers was protected by the First Amendment. (12a-13a). In addition, petitioners alleged that §479 was unconstitutionally vague as applied to their case and thus denied them due process. (13a-15a).

Rejecting petitioners' defense without even a fact-finding hearing, the Appellate Division ruled on the basis of the papers submitted that petitioners were guilty of professional misconduct. (2a-7a).[4/] Petitioners then filed a jurisdictional statement with the New York Court of Appeals, renewing their claims under the First Amendment and Due Process Clause. On November 18, 1982, petitioners' appeal was dismissed sua sponte by the Court of Appeals "upon the ground that no substantial constitutional question is directly involved." (1a).

This summary action by the New York Court of Appeals was premised upon its prior decision in Greene, which upheld New York's ban on third-party mailings on the theory that such

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4/ That finding represents a "professional stigma," even in the absence of any other sanction. Greene v. Grievance Committee, 54 N.Y.2d at 123.

mailings pose a potential conflict of interest.[5/] The majority in Greene hypothesized that a lawyer who receives a referral from a real estate broker might have divided allegiance between the client and the broker on whom the lawyer is depending for future referrals. 54 N.Y.2d at 129. Consequently, the Greene court feared, the lawyer might be disinclined to bargain on behalf of the client about, for example, the broker's commission. Id.

The dissent in Greene responded to those concerns by noting that the dangers identified by the majority existed in any referral system, did not depend upon the fact that the referral was based on a letter rather than social

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5/ One year prior to Greene, the New York Court of Appeals had unanimously held that "[d]irect mail solicitation of clients by lawyers is constitutionally protected speech which may be regulated but not proscribed." Koffler v. Joint Bar Association, 51 N.Y.2d 140, 143, cert. denied, 450 U.S. 1026 (1981).

contacts, and could be dealt with by less restrictive means. 54 N.Y.2d at 129-136. In short, the dissent dismissed the majority opinion in Greene as "no more than direful speculation which . . . reflects perhaps unconscious, but nevertheless impermissible obeisance to the tastes and traditions of the pre-Bates yesteryear." 54 N.Y.2d at 132.

This case indicates that the New York courts continue to adhere to that outmoded view. As a result, petitioners' constitutional rights, and the rights of the public they seek to serve, have been improperly abridged.

REASONS FOR GRANTING THE WRIT

This case raises an important question about the permissible scope of state regulation of attorney advertising.

Last term, this Court unanimously upheld the First Amendment right of an attorney to announce the opening of a new office by mailing professional business cards to "a selected list of addressees" despite a disciplinary rule which restricted such announcements to "lawyers, clients, former clients, personal friends, and relatives." In the Matter of R.M.J., 455 U.S. 191 (1982). This case involves a similar effort by attorneys to alert prospective clients of their availability to handle real estate matters through a targeted mailing to selected real estate brokers.

New York's refusal to permit any third-party mailings regardless of content is inconsistent with R.M.J. and should be summarily reversed. There is no showing in this record

that third-party mailings are inherently deceptive or have proven deceptive in practice. Indeed, it is undisputed in this case that the flyers actually mailed by petitioners were neither deceptive nor misleading. Under the circumstances, New York's decision to impose a prior restraint on all third-party mailings, without even considering the possibility of less restrictive alternatives, plainly contravenes the holding of R.M.J. Notably, when this identical issue was presented to the Court last year in another case from New York, four Justices voted to remand for reconsideration in light of R.M.J. See Greene v. Grievance Committee, 54 N.Y.2d 118 (1981), cert. denied, ___ U.S. ___, 72 L.Ed.2d 153 (1982).

At the very least, this case involves a crucial form of attorney advertising which has not yet been specifically addressed by this Court and is, therefore, appropriate for plenary review. In Bates v. State Bar of Arizona,

433 U.S. 350 (1977), this Court struck down a general proscription against attorney advertising on the ground that "such speech serves individual and societal interests in assuring informed and rational decisionmaking." 433 U.S. at 364. In Ohralik v. Ohio Bar Association, 436 U.S. 447, 449 (1978), the Court reaffirmed Bates, but held that Bates had not withdrawn a state's right to "discipline a lawyer for soliciting clients in person, for pecuniary gain, under circumstances likely to pose dangers that the State has a right to prevent." As characterized by the courts below, this case concerns conduct falling between Bates and Ohralik.

The issue presented to this Court is not, however, a mere academic exercise in legal analogy. Most people in this country who require a lawyer must seek the advice of others. The era of "small town society" when "reputational information" was common knowledge

has long since passed. Bates v. State Bar of Arizona, 433 U.S. at 374-375 n.30. Not surprisingly, these "changed conditions" have been clearly perceived by the legal profession and reflected in its Code of Professional Responsibility. Because "the reputations of lawyers are not sufficiently known to enable potential users of legal services to make intelligent choices,"[6/] the Code now affirmatively encourages those needing a lawyer to gather the "[d]isinterested and informed advice of third parties -- relatives, friends, acquaintances, business associates, or other lawyers . . . "[7/]

The decision in this case effectively cripples that salutary process. The most cost

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6/ New York State Code of Professional Responsibility, EC 2-7.

7/ Ibid.

effective way for a lawyer to make his or her services known to a community is often to make the sort of targeted mailing which petitioners used here. In the end, it is the public which profits as much as the lawyer from the dissemination of information. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976). Moreover, prohibiting all third-party mailings will not eliminate the risks associated with a referral system; it will merely restrict the opportunities made available through referrals to a limited group of well-connected lawyers.

Other states which have reviewed the propriety of third-party mailings in the wake of Bates have differed with the conclusion reached by New York. This conflict among the states is especially inappropriate in a First Amendment context and demonstrates the need for "more specific guidance" which only this Court can finally provide. In the Matter of R.M.J.,

455 U.S. at 204 n.16.

In addition, this case presents an important procedural issue of constitutional significance totally distinct from the substantive question of whether New York can prohibit all third-party mailings by lawyers. Petitioners were disciplined for violating a section of New York's Judiciary Law which was written ten years before Bates and has not been amended since. On its face, it purports to ban all attorney advertising in clear violation of Bates. Until the New York Court of Appeals decision in Greene, which occurred after disciplinary charges were filed against petitioners here, there was no way of knowing that this facially invalid statute would be construed to forbid third-party mailings, particularly since that practice is nowhere mentioned in the law itself. Furthermore, the limiting construction imposed by the Court of Appeals -- namely, that §479 prohibits all conduct which may be constitutionally proscribed without specifying what that

conduct involves -- is inherently vague. Petitioners were disciplined, in short, for violating a statute with absolutely no notice that it applied to their conduct. That result offends fundamental notions of constitutional due process.

I. THE DECISION BELOW CREATES A CONFLICT WITH THE DECISIONS IN OTHER STATES

The decision below is directly in conflict with decisions on the same subject issued by at least two other state courts of last resort. In Matter of State Bar Grievance Administrator v. Jacques, 407 Mich. 26 (1979), the Michigan Supreme Court upheld the right of a lawyer to solicit tort claims through a union agent. In Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky. 1978), the Kentucky Supreme Court upheld the right of a lawyer to do precisely what petitioners have done here -- send a letter to a real estate broker soliciting business.

Both these decisions were acknowledged

and rejected by the New York Court of Appeals in the Greene case, 54 N.Y.2d at 129 n.4, which formed the predicate for the decision below. In addition to Kentucky and Michigan, Minnesota has also refused to prohibit third-party mailings in the absence of an agency relationship between the attorney and any third parties who receive his announcement. Matter of Discipline of Appert, 315 N.W.2d 205 (Minn.Sup.Ct. 1981). Only then, the Minnesota court reasoned, could the attorney fairly be held responsible for the personal solicitation of the potential client by an intermediary.

The conflict among the states on whether third-party mailings are entitled to constitutional protection is also reflected in conflicting ethical rulings from state bar associations. The Grievance Committee of the Board of Overseers of the Maine Bar has issued an opinion (25a-33a) that Maine's anti-solicitation rule permits an attorney to write to the relatives of an accident victim offering legal representation,

providing that the solicitation letter is not sent personally to a victim who is still in the hospital. Similarly, Oregon has specifically upheld the propriety of third-party mailings and, indeed, has used letters by attorneys to real estate brokers as a paradigmatic example of permissible conduct. (34a). Oregon Legal Ethics Opinion Number 431, Guideline 15. Likewise, an Advisory Committee on Professional Ethics appointed by the Supreme Court of New Jersey has announced that "simple letters by attorneys advertising the availability of their services" may be mailed to real estate brokers so long as the brokers "have no personal acquaintance with the attorney." (35a-40a).

By contrast, the Illinois State Bar Association has declared in its advisory opinion on this subject that an attorney may not send solicitation letters "to a targeted group of non-attorneys," although such letters may be sent to other lawyers. Illinois State Bar

Association, Committee on Professional Ethics, Opinion Number 749. (41a-46a).

The authority to discipline lawyers and set rules for practice is, of course, a matter of state prerogative. But the discretion of the state is subject to constitutional constraints. Only this Court can resolve the dispute which has arisen among the states in the wake of Bates on the constitutionality of third-party mailings by lawyers.

II. THE DECISION BELOW REPRESENTS AN UNCONSTITUTIONAL ABRIDGEMENT OF FREE SPEECH AND IS INCONSISTENT WITH THE PRINCIPLES GOVERNING ATTORNEY ADVERTISING WHICH THIS COURT HAS PREVIOUSLY ENUNCIATED

Following this Court's decisions in Bates and R.M.J., there can no longer be any serious claim that attorney advertising is beyond constitutional protection as a species of expression. Notwithstanding its commercial aspect, this Court has recognized that attorney advertising plays a vital role in informing a public

which is increasingly dependent on legal services.

Nor is there any dispute about the standard to be applied in judging the constitutionality of New York's total ban on third-party mailings. Such a prophylactic rule is only permissible "where the particular advertising is inherently likely to deceive or where the record indicates that a particular form or method of advertising has in fact been deceptive." In the Matter of R.M.J., 455 U.S. at 202. That standard was not met in R.M.J. with regard to Missouri's prohibition against a general mailing announcing the opening of a new business office, 455 U.S. at 206, and it has not been met by New York State here. Significantly, there has been no allegation that the letters sent by petitioners were deceptive or that similar letters have proved deceptive in the past. On this "silent record," id., petitioners are entitled to summary reversal.

The standard enunciated in R.M.J. represents a particularized application of the four-part analysis developed by this Court for commercial speech cases in Central Hudson Gas & Electric Company v. Public Service Commission, 447 U.S. 557 (1980). The first two prongs of that test present no problem in this case. There has never been any claim that petitioners' letter to real estate brokers was in any way misleading, and the state's interest in maintaining the quality of legal services is both obvious and substantial. Rather, the issue has been from the beginning whether New York's total ban on third-party mailings "directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 556.

In sustaining the ban, first in Greene and then in this case, the New York courts have relied on two separate theories. First, New

York has concluded that third-party mailings to real estate brokers raise the possibility, condemned by Ohralik, that some brokers may exert undue pressure on their clients to use a specific attorney. Second, New York has argued that the use of third-party mailings creates a potential conflict of interest which can only be addressed by an absolute prior restraint. Neither justification withstands scrutiny.

Even accepting that petitioners' letter presumed further contact between broker and client, and even assuming that contact would take the form of personal conversation, it poses none of the dangers which troubled the Ohralik Court. Most importantly, the broker's financial self-interest is not affected by whether his advice about a lawyer is accepted by the client. Thus, there is no reason to believe that the broker will pressure his or her client into a "speedy and perhaps uninformed decision[]" based on "a one-sided presentation."

436 U.S. at 457. To the contrary, the broker's self-interest is advanced by maintaining the confidence and trust of his or her client. In any event, lawyers should not generally be penalized nor the public denied important information because some real estate brokers may act irresponsibly.

The concern about potential conflicts of interest relates more directly to the attorney but is no more well-focused. As articulated by Greene, a lawyer who accepts referrals from a real estate broker may be less inclined to antagonize the broker by questioning the marketability of title or disputing the broker's fee. 54 N.Y.2d at 129. However that may be, the ban on all third-party mailings is both grossly underinclusive and overinclusive.

It is underinclusive because a potential conflict of interest is just as likely to arise if the referral is based on a social contact instead of a mailing, but third-party referrals

have never been forbidden for that reason. See Ohralik v. Ohio State Bar Association, 436 U.S. at 475 (Marshall, J., concurring). And it is overinclusive for reasons pointed out by this Court in Bates:

> We suspect that, with advertising, most lawyers will behave as they always have. They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter's interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust. 433 U.S. at 379.

When regulating First Amendment speech, a closer fit is required between means and ends, Speiser v. Randall, 357 U.S. 513, 525 (1958). Moreover, "[r]estraints on advertising are an ineffective way of deterring shoddy work," Bates v. State Bar of Arizona, 433 U.S. at 378, especially in light of the close regulation to which attorneys are subject. See Virginia

State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 768. The "interference with speech" created by New York's rule in this context is not "in proportion to the interest served." In the Matter of R.M.J., 455 U.S. at 203.

Finally, less restrictive alternatives exist to satisfy the concerns expressed by the New York courts. The state already has the authority to discipline lawyers for conflicts of interest. Or, if the state were seeking a prophylactic measure, it could have imposed a filing requirement to monitor third-party mailings or insisted on an appropriate disclaimer. Either alternative would have impinged less directly on constitutionally protected speech. The latter alternative has been expressly endorsed by the Kentucky Supreme Court. Kentucky Bar Association v. Stuart, 568 S.W.2d at 934.

This Court's comments in R.M.J. are equally appropriate here:

> Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards. Nor is it clear that an absolute prohibition is the only solution. For example, by requiring a filing with the Advisory Committee of a copy of all general mailings, the State may be able to exercise reasonable supervision over such mailings. There is no indication in the record of a failed effort to proceed along such a less restrictive path. 455 U.S. at 206 (footnotes omitted).

Similarly, New York has not demonstrated why it is unable to employ less restrictive means than a total ban on attorney mailings to real estate brokers to achieve reasonable regulation in this area.

III. THE DECISION BELOW OFFENDS DUE PROCESS BY UPHOLDING A DISCIPLINARY SANCTION BASED ON A STATE STATUTE WHICH PROVIDES NO NOTICE OF WHAT CONDUCT IT PROSCRIBES

Petitioners were found guilty of professional misconduct by the New York State courts for violating a section of the Judiciary Law

which bans all lawyer advertising. The statute was enacted in 1967, a decade before Bates, and has not been amended. Acknowledging its facial invalidity following Bates, the New York Court of Appeals has nonetheless ruled that "the section remains effective except as constitutionally proscribed." Greene v. Grievance Committee, 54 N.Y.2d at 124. The decision in Greene was announced after petitioners had already sent the letter which led to the misconduct charges which were filed against them. Prior to Greene, petitioners could not have predicted whether their third-party mailings would fall within some constitutional residuum of the law which had not yet been defined. A state may not, consistent with due process, punish all conduct which may be "constitutionally proscribed" without more clearly specifying what activities are prohibited.

Since the subject of third-party mailings

is not even mentioned in section 479, the interpretive efforts of the Greene Court were vastly different from the process of severing an unconstitutional portion of an otherwise valid and specific enactment. In a classic understatement, the New York Court of Appeals conceded in Greene that "amendment of the section might clarify the intent of the Legislature . . . " 54 N.Y.2d at 124. Indeed, without an amendment, the intent of the legislature is entirely obscure. The attempt to define section 479 by the unwritten progeny of Bates has turned that section into a vague and imponderable statute which gives wholly insufficient guidance as to what conduct it bars.

Fifty years ago, this Court condemned "exaction of obedience to a standard that is so vague and indefinite as to be really no standard at all." Champlin Refining Co. v. Corp. Commission of Oklahoma, 286 U.S. 210, 243 (1932). "[B]ecause we assume that man is free

to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Thus, "a statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." Connally v. General Construction Co., 269 U.S. 385, 391 (1926).[8/]

Section 479, which expressly forbids conduct which may not be proscribed under Bates, and which as construed may or may not proscribe conduct depending only on the future

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8/ The difficulty of anticipating what conduct may be "constitutionally proscribed" is highlighted in this case by the fact that the Greene opinion itself is apparently inconsistent with this Court's later decision in R.M.J.

reach of cases interpreting Bates, fails this basic test. It cannot be constructed by the New York State courts on a case-by-case basis. At the very least, fundamental fairness requires that any new interpretation of the statute should be applied only prospectively and not to petitioners whose good faith belief that their actions were lawful has never been disputed.

CONCLUSION

For the reasons stated herein, this Court should grant the petition for a writ of certiorari and summarily reverse the judgment below. In the alternative, certiorari should be granted and this case scheduled for plenary review.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS
STATE OF NEW YORK

In the Matter of Donald A. Alessi, John P. Bartolomei, et al., Attorneys.

Committee on Professional Standards, Third Judicial Department, Respondent,

Donald A. Alessi and John P. Bartolomei, Appellants,

et al., Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Clerk of the Court

November 18, 1982

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

IN THE MATTER OF

DONALD A. ALESSI, AN ATTORNEY,
JOHN P. BARTOLOMEI, AN ATTORNEY,
HENRY PEDICONE, JR., AN ATTORNEY,
LINDA ZABLOTNY, AN ATTORNEY,

Respondents,

and

COMMITTEE ON PROFESSIONAL STANDARDS,

Petitioner.

ORDER

A disciplinary proceeding having been instituted in this court upon the petition of the Committee on Professional Standards in respect to Donald A. Alessi, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, Fourth Judicial Department, on July 16, 1970, John P. Bartolomei, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, Fourth Judicial Department, on April 8, 1970,

Henry Pedicone, Jr., an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, Second Judicial Department, on October 13, 1976, Linda Zablotny, an attorney and counselor at law, who was admitted to practice by the Appellate Division of the Supreme Court, Fourth Judicial Department, on September 12, 1977; the petition praying that the respondents be disciplined for professional misconduct upon the charges therein set forth; the proceeding having come on before this court by a notice of petition, dated April 22, 1981; and the respondents having filed an answer thereto; and the respondents having moved by notice of motion, dated May 14, 1982, to refer the issues raised by the pleadings to a judge to hear and report;

Now, on reading and filing the said petition, verified April 22, 1981, the said answer, verified April 9, 1982; the respondents' notice

of motion and the affidavit of Richard G. Collins in support of said motion, and upon all the papers filed herein; and, after due deliberation, the Court having rendered a decision on the 22nd day of June, 1982, it is

ORDERED that the motion to refer the issues raised by the pleadings to a judge to hear and report is denied, and it is further

ORDERED that respondents are guilty of misconduct in permitting or approving the mailing of letters to realtors as alleged in the petition, no sanctions shall be imposed for such misconduct.

John J. O'Brien
Clerk of the
Appellate Division

DATED AND ENTERED:
August 3, 1982

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of DONALD A. ALESSI, JOHN P. BARTOLOMEI, HENRY PEDICONE, JR., and LINDA ZABLOTNY, Attorneys,

Respondents.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner.

Respondents Alessi, Bartolomei and Zablotny were admitted to the Bar by the Appellate Division, Fourth Judicial Department, on July 16, 1970, April 8, 1980 and September 12, 1977, respectively. Respondent Pedicone was admitted by the Appellate Division, Second Judicial Department, on October 13, 1976.

The petition in this disciplinary proceeding charges that respondents, as partners or employees of a legal clinic with an office in Albany, in violation of section 479 of the Judiciary Law and DR 2-103(A) of the Code of Professional Responsibility, permitted or

approved the mailing of approximately 1,000 letters to realtors in the Albany area during August and September 1979 soliciting, through the realtors, real estate closings of prospective purchasers and sellers of real property.

Respondents moved to dismiss the petition on the ground that the mailings were a valid exercise of their constitutional right. to freedom of expression. Since Matter of Greene (78 AD2d 131), a similar case involving direct mail addressed to real estate brokers, was then on appeal to the Court of Appeals, we directed that the motion to dismiss be held pending determination of the appeal. On October 29, 1981 the Court of Appeals affirmed Greene, holding that section 479 of the Judiciary Law and DR 2-103(A) of the Code, to the extent that they proscribe advertising of attorneys' services by direct mail addressed to real estate brokers, are constitutional (54 N.Y.2d 118). We then denied the motion to

dismiss and an answer was filed by respondents after the United States Supreme Court denied a petition for a writ of certiorari in Greene (___ U.S. ___, 50 U.S.L.W. 3766).

Respondents now move to refer the issues raised by the pleadings to a judge to hear and report. We determine that a reference is unnecessary and we find respondents guilty of misconduct in permitting or approving the mailing of letters to realtors as alleged in the petition. However, since the letters were apparently sent in good faith in reliance on Bates v. State Bar of Arizona (433 U.S. 450) and prior to the decision of the Second Department in Greene, we determine that no sanction should be imposed for such misconduct.

MAHONEY, P.J., SWEENEY, KANE, MAIN and CASEY, JJ., concur.

June 22, 1982

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, commencing on the 14th day of December, 1981

PRESENT:

HON. A. FRANKLIN MAHONEY,
Presiding Justice,
HON. MICHAEL E. SWEENEY,
HON. T. PAUL KANE,
HON. ROBERT G. MAIN,
HON. JOHN T. CASEY,
Associate Justices.

In the Matter of DONALD A. ALESSI, JOHN P. BARTOLOMEI, HENRY PEDICONE, JR. and LINDA ZABLOTNY, Attorneys,

Respondents.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner.

The Committee on Professional Standards having filed a petition containing charges of professional misconduct against respondents and respondents having moved for an order dismissing

the petition, and the Court having directed on July 1, 1981 that the motion be held pending determination of the appeal in Matter of Greene by the Court of Appeals;

Now, on reading and filing the petition of the Committee on Professional Standards, verified April 22, 1981; and respondents' notice of motion dated June 3, 1981, and the affidavit of Richard G. Collins, Esq., attorney for respondents, sworn to June 29, 1981, in support of the motion; and, after due deliberation, the court having rendered a decision on the 15th day of January, 1982, it is

ORDERED that the motion to dismiss petition be and the same hereby is denied, with leave to the respondents to file and serve an answer within 20 days after service of a copy of this order.

John J. O'Brien
Clerk

DATED AND ENTERED:
January 15, 1982

CONFIDENTIAL - NOT FOR PUBLICATION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

In the Matter of DONALD A. ALESSI, JOHN P. BARTOLOMEI, HENRY PEDICONE, JR., and LINDA ZABLOTNY, Attorneys,

Respondents.

COMMITTEE ON PROFESSIONAL STANDARDS, THIRD JUDICIAL DEPARTMENT,

Petitioner.

Motion to dismiss petition denied (Matter of Greene, ___ N.Y.2d ___ [Oct. 29, 1981]), affg. 78 AD.2d 131), with leave to the respondents to file and serve an answer within 20 days after service of a copy of the order to be entered hereon.

MAHONEY, P.J., SWEENEY, KANE, MAIN and CASEY, JJ., concur.

January 15, 1982

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

IN THE MATTER OF	
DONALD A. ALESSI, AN ATTORNEY, JOHN P. BARTOLOMEI, AN ATTORNEY, HENRY PEDICONE, JR., AN ATTORNEY, LINDA ZABLOTNY, AN ATTORNEY,	ANSWER
Respondents,	
and	
COMMITTEE ON PROFESSIONAL STANDARDS,	
Petitioner.	

The Respondents, Donald A. Alessi, John P. Bartolomei, Henry Pedicone and Linda Zablotny, answering the petition herein:

1. Admit those allegations contained in paragraphs numbered "1," "2" (except that Respondent Alessi now maintains an office for the practice of law at 305 Elmwood Avenue, Buffalo, New York 14222 instead of 732 Brisbane Building, Buffalo, New York 14203), "3" (except that Respondent Bartolomei now maintains an office for

the practice of law at 335 Buffalo Avenue, Niagara Falls, New York 14303 instead of 755 Center Street, Lewiston, New York 14092), "4" and "5" of the petition and those allegations contained in specifications numbered "I," "3," "4," "5," "6" and "7" in the petition.

2. Deny those allegations contained in paragraph numbered "6" in the petition, those allegations contained in specification numbered "2" in the petition, and each and every other allegation in said petition not hereinbefore otherwise specifically admitted or denied.

FOR A FIRST, SEPARATE AND COMPLETE DEFENSE TO THE PETITION, AND OBJECTION IN POINT OF LAW, THE RESPONDENTS ALLEGE:

3. Respondents' conduct as alleged in the petition was constitutional free speech protected under the First and Fourteenth Amendments of the United States Constitution and Article 1, sections 6 and 8 of the New York State Constitution.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE TO THE PETITION, AND OBJECTION IN POINT OF LAW, THE RESPONDENTS ALLEGE:

4. Section 479 of the Judiciary Law is violative of the First and Fourteenth Amendments of the United States Constitution and Article 1, sections 6 and 8 of the New York State Constitution in that it forbids on its face all lawyer advertising and thus seeks to proscribe constitutionally protected free speech.

FOR A THIRD, SEPARATE AND COMPLETE DEFENSE TO THE PETITION, AND OBJECTION IN POINT OF LAW, THE RESPONDENTS ALLEGE:

5. Section 479 of the Judiciary Law on its face is violative of the Fourteenth Amendment to the United States Constitution and Article 1, section 6 of the New York State Constitution in that not all lawyer advertising can be constitutionally proscribed, and section 479 therefore fails to give sufficient advance

notice of what lawyer advertising in fact is proscribed.

FOR A FOURTH, SEPARATE AND COMPLETE DEFENSE TO THE PETITION, AND OBJECTION IN POINT OF LAW, THE RESPONDENTS ALLEGE:

6. As applied to the Respondents in this case, section 479 of the Judiciary Law violates Respondents' constitutional right to Due Process of Law as guaranteed them by the Fourteenth Amendment of the United States Constitution and Article 1, section 6 of the New York State Constitution in that section 479 was not interpreted by any New York court to forbid the conduct with which Respondents are charged until after Respondents allegedly performed their conduct. Because the content of section 479 of the Judiciary Law is neither meaningful nor comprehensible without judicial interpretation, Respondents were given absolutely no advance guidance as to how to conform their conduct to comply with section 479 of the

Judiciary Law.

FOR A FIFTH, SEPARATE AND COMPLETE DEFENSE, AND BY WAY OF MITIGATION, RESPONDENTS ALLEGE:

7. Assuming that section 479 of the Judiciary Law does in fact constitutionally proscribe the conduct with which Respondents are charged, Respondents had no notice of this fact when they participated in the mailing of the letters alleged in the petition since the judicial decision in this State which interpreted section 479 of the Judiciary Law as a ban on Respondents' conduct occurred after Respondents performed their conduct.

8. Respondents at the same time they participated in the letters alleged in the petition were acting on the good faith assumption that such mailings were permissible forms of lawyer advertising. Their assumption was buttressed by a legal opinion they had solicited from their counsel, and their assumption has been endorsed by two judges of the Court of

Appeals in the dissenting opinion of Matter of Greene, 54 N.Y.2d 118, and possibly four justices of the United States Supreme Court in that court's decision of March 23, 1982 to deny a petition for a writ of certiorari in Matter of Greene.

9. Since the conduct with which Respondents are charged in the petition is malum prohibitum rather than malum in se, justice would be served by a dismissal of the petition herein based upon this defense.

10. If the petition is not dismissed, justice would be served by this Court taking no disciplinary action against Respondents based upon this defense.

WHEREFORE, Respondents pray that the Court render a judgment dismissing the proceeding herein on the merits.

Richard G. Collins
Attorney for Respondents
Office and Post Office Address
305 Elmwood Avenue
Buffalo, New York 14222
Tel: (716) 884-6733

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: THIRD DEPARTMENT

IN THE MATTER OF DONALD A. ALESSI, AN ATTORNEY, JOHN P. BARTOLOMEI, AN ATTORNEY, HENRY PEDICONE, JR., AN ATTORNEY, LINDA ZABLOTNY, AN ATTORNEY,	:	
Respondents,	:	PETITION OF CHARGES AND SPECIFICATIONS
AND	:	
COMMITTEE ON PROFESSIONAL STANDARDS,	:	
Petitioner.	:	

TO THE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT:

The Committee on Professional Standards, Third Judicial Department, by George B. Burke, Chief Attorney, respectfully alleges upon information and belief that:

1. Petitioner is a committee duly authorized by the Rules of the Appellate Division, Third Department, to bring this proceeding.

2. Respondent, Donald A. Alessi, was

admitted to practice as an attorney by order of the Appellate Division, Fourth Department, on July 16, 1970 and was a partner in the Legal Clinic of Cawley and Schmidt with administrative offices at 1370 Niagara Falls Boulevard, Tonawanda, New York as well as an office at 1531 Central Avenue, Albany, New York 12205. Respondent Alessi also maintains an office for the practice of law at 702 Brisbane Building, Buffalo, New York 14203.

3. Respondent, John P. Bartolomei, was admitted to practice as an attorney by order of the Appellate Division, Fourth Department, on April 8, 1980 and was a partner in the Legal Clinic of Cawley and Schmidt with administrative offices at 1370 Niagara Falls Boulevard, Tonawanda, New York and an office at 1531 Central Avenue, Albany, New York. Respondent Bartolomei also maintains an office for the practice of law at 755 Center Street, Lewiston, New York 14092.

4. Respondent, Henry Pedicone, Jr., was admitted to practice as an attorney by order of this court on October 13, 1976 and was employed as an attorney for the Legal Clinic of Cawley and Schmidt at 1531 Central Avenue, Albany, New York.

5. Respondent, Linda Zablotny, was admitted to practice as an attorney by order of the Appellate Division, Fourth Department, on September 12, 1977 and was Administrative Attorney for the Legal Clinic of Cawley and Schmidt, 1370 Niagara Falls Boulevard, Tonawanda, New York 14150 and supervised the office maintained by the clinic at 1531 Central Avenue, Albany, New York.

6. Respondents have been guilty of professional misconduct and conduct prejudical to the administration of justice within the meaning of the Judiciary Law, Section 90, subdivision 2 and conduct tending to bring the legal profession into disfavor and disrepute as follows:

CHARGE I

Respondents, individually and collectively, solicited legal business in violation of Disciplinary Rules DR 2-101(A)(B); DR 2-103(A); DR 2-103(E) of the Code of Professional Responsibility and Section 479 of the Judiciary Law.

SPECIFICATION I

During August and September, 1979 approximately 1,000 letters were mailed to realtors in the geographical area serviced by the Albany office of the Legal Clinic of Cawley and Schmidt from the office at 1531 Central Avenue, Albany, New York 12205. A copy of one of the letters is set forth as Exhibit A attached hereto.

SPECIFICATION 2

The intent of said letter was to solicit real estate closings through the realtors of prospective purchasers and sellers of real property on behalf of respondents Donald A.

Alessi, John P. Bartolomei, Henry Pedicone, Jr. and Linda Zablotny.

SPECIFICATION 3

Said form letter was drafted by respondent, Linda Zablotny.

SPECIFICATION 4

Respondent Alessi reviewed and approved said letter for the purpose of the mailing.

SPECIFICATION 5

Respondent Bartolomei reviewed and approved said letter for the purpose of the mailing.

SPECIFICATION 6

Respondent Pedicone allowed his name to be signed to the letter by his secretary for the purpose of the mailing.

SPECIFICATION 7

These mailings were approved by respondents Alessi, Bartolomei and Zablotny.

DATED: April 22, 1981

George B. Burke,
Chief Attorney
Committee on Professional Standards
P. O. Box 7013
Capitol Station Annex
Albany, New York 12225
(518) 474-8816

THE LEGAL CLINICS of Cawley & Schmidt

ATTORNEYS AT LAW

LINDA C. CAWLEY (MD)
WILLIAM R. SCHMIDT (MD)
DONALD A. ALESSI (N.Y.)
JOHN P. BARTOLOMEI (N.Y.)

LINDA A. ZABLOTNY (N.Y.)
JOHN C. MILLER (N.Y.)
KENNETH G. SILLIMAN (N.Y.)
JOHN W. ALLEN (N.Y.)
HENRY L. PEDICONE JR. (N.Y.)
GEORGE M. GEISER (N.Y.)
ALAN E. FIELITZ (N.Y.)

NEW YORK OFFICES:
AMHERST-TONAWANDA
HENRIETTA
SYRACUSE
ALBANY

MARYLAND OFFICES:
FELLS POINT
TOWSON
GLEN BURNIE
RIVERDALE
COLUMBIA

BOSTON OFFICES:
MALDEN
QUINCY

TENNESSEE OFFICE:
NASHVILLE

N
Y

ALBANY
1531 Central Avenue
Albany, New York 12205
(518) 869-0595

Dear Realtor:

We recognize that the costs attendant to the sale or purchase of a home are a real concern to your clients that may indeed influence whether a transaction will even take place. The Legal Clinics of Cawley and Schmidt will handle all aspects (buy or sell) of residential real estate transfers at the following affordable attorney's fees:

1. Where purchase price is $30,000 or more $ 295.00
2. Where purchase price is $20,000 or more, but under $30,000 215.00
3. Where purchase price is under $20,000 175.00

These fees are of course exclusive of Seller's disbursements, such as the cost of the search continuation, survey redate, N.Y.S. Transfer Tax Stamps, Recording/filing fees and Broker's Commissions, and, Purchaser's expenses, such as Recording/filing fees, Mortgage Tax and Bank attorney's fees.

Contact us for more information during our convenient office hours:

Monday/Wednesday/Friday	9 AM - 5 PM
Tuesday/Thursday	9 AM - 9 PM
Saturday	9 AM - noon

Very truly yours,

LEGAL CLINIC OF CAWLEY & SCHMIDT

BY: Edward Pedersen, Jr.

Opinion #16
Issued 10/15/80

THE GRIEVANCE COMMISSION
OF THE
BOARD OF OVERSEERS OF THE BAR

QUESTION

The Grievance Commission has been asked by a lawyer if it would be permissible under the Maine Bar Rules for that lawyer to mail a letter soliciting employment, as follows:

(letterhead)

Dear _____

I understand that your _____ had recently sustained injuries in an accident. It has been my experience that many people are unaware that they may be entitled to compensation for their injuries even in situations such as automobile accidents where it appears that the person seeking compensation was at fault or where it appears that no one was at fault.

I am attempting now to concentrate my practice in the area of cases involving serious

personal injuries or death and probate (settling the affairs of persons who have died). I am attempting this concentration in hopes that it will better allow me to serve the needs of clients who have suffered serious personal injuries or who are the heirs or representatives of persons who have died.

Pursuant to the Maine Bar Rules, Rule 3.9, I am not allowed to make any unwarranted suggestions or promises of benefits or to contact you under circumstances which create a risk of undue influence. If, however, after reviewing my letter and giving careful consideration to the possibility that there may be some right to compensation for the injuries suffered in the recent accident, you wish to contact me or another attorney to check into this matter further feel free to do so.

Should you choose to contact me, you should be aware that it is my practice not to charge for an initial office interview for the

purpose of evaluating whether there may be a potential claim. You should also be aware that the most common types of fee arrangements which I enter into in cases involving serious injuries or death are what are known as contingent fees, in which my fee is based upon a percentage of the amount of compensation recovered for the injured party, or a fee based on an hourly rate. In handling cases on an hourly rate, I simply charge an agreed rate per hour billed monthly to the client. By requirement of the probate courts, all probate cases are handled on an hourly rate.*

In the event that you and the injured party wish to discuss the possibility of securing some compensation for the injuries with me, simply call my secretary and arrange an appointment for a time which is mutually convenient.

Sincerely yours,

*The Commission is doubtful as to the factual accuracy of this statement.

OPINION

Maine Bar Rule 3.9 governs and regulates advertising and solicitation by Maine lawyers. Because the lawyer's letter referred to above is intended to be sent to an individual and pertains to a singular situation involving personal injury, the propriety of the lawyer's conduct in sending the letter is governed by sub-section (f) of that Rule which prescribes the standards by which lawyer solicitation must be measured. Maine Bar Rule 3.9(f) provides:

> (f) Recommendation or Solicitation of Employment.
>
> (1) A lawyer shall not solicit employment on behalf of himself or any lawyer affiliated with him through any form of personal contact:
>
> (i) By using any statement, claim, or device that would violate this rule if part of a public communication;

(ii) By using any form of duress or intimidation, unwarranted suggestions or promises of benefits, or engaging in deceptive, vexatious, or harassing conduct; or

(iii) When the circumstances create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited. Without limitation, such circumstances will be deemed to exist as to the person solicited if he is in the custody of a law enforcement agency or under treatment in a hospital, convalescent facility, or nursing home, or if his mental faculties are impaired in any way or for any reason. Notwithstanding the foregoing, such circumstances shall be deemed not to exist when a lawyer is discussing employment with any person who has, without solicitation by the lawyer or anyone acting

for him, sought the lawyer's advice regarding employment of a lawyer.

(2) A lawyer shall not compensate, or give anything of value to, a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay for public communication permitted by these rules and may pay the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(3) A lawyer shall not knowingly assist or authorize any other person or organization to engage in conduct that would violate this rule if engaged in by a lawyer personally, nor shall a lawyer accept employment when he knows, or it is obvious, that the person who seeks

his services does so as a result of conduct prohibited under this rule.

It is the opinion of the Commission that the letter must be treated as an indirect solicitation of the accident victim even though it is addressed to a relative. Since it is the accident victim who has the claim in which the lawyer is interested, it is obvious that the letter is intended to be communicated to him by the recipient. This conclusion is reinforced by the last paragraph of the letter which states that if the addressee or "the injured party" wish to discuss the potential claim with the letter writer, he would be glad to oblige.

It cannot be said, however, that it would be a per se violation of the rule for the lawyer to send the letter in question. Indeed, the letter appears to be carefully drafted with the view to complying with the standards contained in Rule 3.9(f). The

letter itself, however, tells only half the story. Since, as indicated above, the letter must be taken as having been directed to the accident victim, the rule would be violated if it were received by him while under treatment in a hospital or under the other circumstances set forth in sub-section (1)(iii).[1/]

It is conceivable that a lawyer could have made inquiry to satisfy himself that the accident victim had been discharged from the hospital and that the circumstances did not otherwise "create an appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited." The Commission is of the opinion that the rule would

---

1/ The Commission takes this opportunity to observe that the prohibition of Rule 3.9(f)(1)(iii) is framed in terms of "appreciable risk of undue influence by the lawyer or ill-considered action by the person being solicited." Explicit proof or findings of harm or injury is immaterial. See Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912 (1978).

not be violated if a lawyer had taken such steps to assure that the circumstances deemed in the rule to constitute a violation did not in fact exist even if, by some mischance, as in the case of a sudden relapse by the accident victim, the letter were nevertheless received by him while back in the hospital. The Commission believes that where, despite the fact that reasonable precautions are taken and good faith is exercised by the lawyer, a solicitation inadvertently occurs under circumstances described in sub-section iii, the policy of the rule will be satisfied by simply barring the lawyer from accepting the case if he should later be requested to undertake it.

Oregon Legal Ethics Opinions, No. 431,

Page 10, Guideline No. 15. Letters.

> Subject to the rules and guidelines relating to solicitation and to the content of advertising, a lawyer may advertise by mailing letters.

Discussion: Letters as forms of advertising have presented difficult problems, perhaps because they can be subject to abuse as a substitute for in-person solicitation. If letters are otherwise proper in content, and are properly distributed, they are permissible advertisements. See Kentucky Bar Assoc. v. Stuart, 568 SW2d 933 (Ky. 1978) (letters mailed to real estate agencies setting forth fees for routine legal services and other information did not constitute impermissible solicitation). Letters that contain improper content or are distributed in an improper manner so as to constitute prohibited solicitation, are not allowed.

(January 1, 1981)

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

Opinion 468
Advertising - In
Various Forms

The inquirer poses questions of appropriateness of various forms of advertising by lawyers since the decision of the U.S. Supreme Court in Bates v. State Bar Association of Arizona, 433 U.S. 350, 53 L.Ed.2d 810 (1977). While the Court there upheld the First Amendment right of lawyers to advertise their services, it went on to declare that such advertising must not be false, deceptive or misleading and if it is, it may be restrained. It said at page 836:

> ***"as with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place and manner of advertising." (Emphasis added)

See Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 778, 48 L.Ed.2d 346 (1976).

A more recent discussion of the subject is found in Ohralik v. Ohio State Bar Association, 436 U.S. 447, 56 L.Ed.2d 444 (1978). In Ohralik, the question was one of direct solicitation rather than by mail. At page 456 of Ohralik, the Court referred to the fact that truthful restrained advertising of the prices of "routine" legal services would not have an adverse effect on the professionalism of lawyers. It is clear, therefore, that the courts of the respective states which control the conduct of lawyers were not stripped of their authority reasonably to regulate advertising. See also In re Primus, 436 U.S. 412, 56 L.Ed.2d 417 (1977), and Kentucky Bar Association v. Stuart, 568 S.W.2d 933 (Ky.Sup.Ct. 1978).

The question of solicitation in person or by mail of other media is subject to regulation but such regulation must be reasonable. As was stated in Ohralik, the State has a legitimate and important interest in protecting the public

from those aspects of an attorney's soliciting of clients that involve fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct.

In this inquiry, several forms of solicitation are brought to our attention. One is a sample of several different letters directed by lawyers to realtors, industrial concerns and other corporations stating that they are interested in serving them, listing the services to be performed and the charges to be made. Another is a printed publication by a lawyer setting forth his billing charges, how he bills, his educational background and his bar association memberships. There is also an advertisement by a lawyer in a supermarket coupon book, distributed at the supermarket, in which his name appears on a page where all the other ads are for merchandise discounts. The lawyer has his name, address and lists his fees for various legal services.

The idea of soliciting clients through advertising was for years denounced by bar associations as being unprofessional, unethical and detrimental to the best interests of the profession. In Bates, however, as we have noted above, some reasonable forms of solicitation by advertising are permitted. Parameters of permissible advertising have not yet been established except in general terms as set forth in the various decisions of the Supreme Court. In Mr. Justice Marshall's concurring opinion in Ohralik, he stated, at page 466:

> "By discussing the origin and impact of the nonsolicitation rules, I do not mean to belittle those obviously substantial interests that the State has in regulating attorneys to protect the public from fraud, deceit, misrepresentation, overreaching, undue influence and invasions of privacy. But where honest, unpressed 'commercial' solicitation is involved -- a situation not presented in either of these cases -- I believe it is open to doubt whether the State's interests are sufficiently compelling to warrant the restriction on the free flow of information

> which results from a sweeping non-solicitation rule and against which the First Amendment ordinarily protects."

The opinion pointed out that the Department of Justice had suggested that the disciplinary rules be reworded "so as to permit all solicitations and advertising except the kinds that are false, misleading, undignified and champertous."

We do not believe that simple letters by attorneys advertising the availability of their services addressed generally to a segment of the population with which the lawyers have no personal acquaintance are now proscribed where they are not false, misleading, undignified or champertous to use the words of the Department of Justice. See Opinion 457, 106 N.J.L.J. 98 (1980).

It is our opinion, however, that the ad in the supermarket throw-away on the page with merchandise discount coupons is undignified and,

perhaps, misleading in the sense that people may believe the quoted fees to be discounted fees. It is therefore unethical and should be discontinued.

While a number of other specific hypothetical questions or situations have been posed in the inquiry, we believe it advisable at this stage of the development of the law to address specific problems as they arise and to refrain from trying to answer general hypothetical questions.

ILLINOIS STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

Opinion No. 749
(8/25/81)

FACTS AND QUESTIONS

A lawyer admitted to the Illinois Bar in 1979, after practicing for one year, has now completed his requirements for and expects to receive a Master of Laws Degree (L.L.M.) in Taxation. He inquires:

1. Can I state in the Yellow Pages, newspaper advertisement, business cards, announcements, letterhead, and the sign in front of my office, that I have a Masters of Laws Degree in Taxation and that I am engaged in general practice concentrating in business, estate, and tax planning?

2. Can I send letters and resumes to other attorneys stating that I am available for referrals, project work and consulting on tax and tax-related matters?

3. Can a letter and resume be sent to

attorneys in other states (Missouri, Kentucky and Indiana) stating that I am available for referrals on tax and Illinois matters?

4. Can a letter and resume be sent to non-attorneys in Illinois who are involved in tax matters, such as Certified Public Accountants, trust officers, life insurance agencies and business management or tax services for the purpose of having the attorney recommended to their clients?

OPINION

The answer to the first three questions is a qualified "Yes." The answer to the fourth question is "No."

The Illinois Code of Professional Responsibility (effective July 1, 1980) does not prohibit the types of advertising contemplated by the first three questions.

The advertising mentioned in the first question is directed to lay persons and in keeping with the mandates of Bates & O'Steen v.

State Bar of Arizona (1977), 433 U.S. 350, 97 S.Ct. 2691, Supreme Court Rule 2-101(a) specifies what types of information may be included in commercial publicity or public communications. We think "Yellow Pages," stationery, business card, announcements and office sign advertising which includes the educational and other background information is permissible.

Often the reputation and competence of lawyers (particularly young lawyers) are not sufficiently known to enable lay persons to make intelligent choices and they have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers (see ISBA EC 2-7). Selection of a lawyer by a lay person should be made on an informed basis. Advice and recommendation of

third parties such as relatives, friends, acquaintances, business associates, or other lawyers, and restrained publicity may be helpful. Advertisements and public communications, whether in law lists, announcement cards, newspapers or other forms, should be formulated to convey only information that is necessary to make an appropriate selection. Self-laudation should be avoided (see ISBA EC 2-8). The proper motivation for commercial publicity by lawyers lies in the need to inform the public of availability of competent, independent legal counsel. The public benefit derived from advertising depends upon the usefulness of the information provided to the community or to the segment of the community to which it is directed. Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide that public benefit (see ISBA EC 2-8A).

Thus, misleading and deceptive advertising should be and is prohibited. The Code of Professional Responsibility recognizes the values of giving assistance in the selection process, while avoiding such objections. The forms of advertising permitted by the Code should be direct, dignified and comprehensible (see ISBA EC 2-10).

These same comments apply to the direct mail letters to attorneys contemplated in questions 2 and 3.

With respect to the use of educational degrees in advertising, we note that the ABA Code, in DR 2-102(F) (and the ISBA Code prior to 1975) expressly permits the use of such information. The ISBA Code, however, was amended in 1975 to eliminate DR 2-102(F) and, thereafter, in ISBA Opinion 473 (May 20, 1975), this Committee condemned the use by lawyers of the title "Doctor" in notices, letterhead and signs. See also ISBA Opinion 160 (April 17, 1959).

We believe that the circularization of letters and resumes to a select, targeted group of non-attorneys, is a private communication under Rule 2-103(a) and (e) and is, therefore, improper. We have recently decided, in ISBA Opinion 700 (November 4, 1980), that it is professionally improper for an attorney to initiate private communications with coaches and athletic directors to inform them that he is engaged in the practice of "sports law" and is available to represent clients. There we decided, on the basis of Rule 2-103(a) and ABA EC 2-8 (now, also, ISBA EC 2-8) that such activity was designed improperly to encourage the coaches and directors to recommend the attorney to the athletes under their charge. We think that opinion applies with equal force here.

DR 2-101. Rules of Court Applicable to Advertising and Publicity by Lawyers.

(A) A lawyer on behalf of himself or herself or partners or associates, shall not use or disseminate or participate in the preparation or dissemination of any public communication containing statements or claims that are false, deceptive, misleading or cast reflection on the legal profession as a whole.

(B) Advertising or other publicity by lawyers, including participation in public functions, shall not contain puffery, self-laudation, claims regarding the quality of lawyers' legal services, or claims that cannot be measured or verified.

(C) It is proper to include information, provided its dissemination does not violate the provisions of subdivisions (A) and (B) herein, as to

(1) education, degrees and other scholastic distinctions; dates of admission to any

bar; areas of the law in which the lawyer or firm practices, as authorized by the Code of Professional Responsibility; public offices and teaching positions held; memberships in bar associations or other professional societies or organizations, including offices and committee assignments therein; foreign language fluency;

(2) names of clients regularly represented, providing that the client has given prior written consent;

(3) bank references; credit arrangements accepted; prepaid or group legal services programs in which the attorney or firm participates;

(4) legal fees for initial consultation; contingent fee rates in civil matters when accompanied by a statement disclosing whether percentages are computed before or after deduction of costs and disbursements; range of fees for services, provided that there

be available to the public free of charge a written statement clearly describing the scope of each advertised service; hourly rates; and fixed fees for specified legal services.

(D) Advertising and publicity shall be designed to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel. Information other than that specifically authorized in subdivision (C) that is consistent with these purposes may be disseminated providing that it does not violate any other provisions of this rule.

(E) A lawyer or law firm advertising any fixed fee for specified legal services shall, at the time of fee publication, have available to the public a written statement clearly describing the scope of each advertised service, which statement shall be delivered to the client at the time of retainer for any such service. Such legal services shall include all

those services which are recognized as reasonable and necessary under local custom in the area of practice in the community where the services are performed.

(F) If the advertisement is broadcast, it shall be prerecorded or taped and approved for broadcast by the lawyer, and a recording or videotape of the actual transmission shall be retained by the lawyer for a period of not less than one year following such transmission.

(G) If a lawyer or law firm advertises a range of fees or an hourly rate for services, the lawyer or law firm may not charge more than the fee advertised for such services. If a lawyer or law firm advertises a fixed fee for specified legal services, or performs services described in a fee schedule, the lawyer or law firm may not charge more than the fixed fee for such stated legal service as set forth in the advertisement or fee schedule, unless the client agrees in writing that the services

performed or to be performed were not legal services referred to or implied in the advertisement or in the fee schedule and, further, that a different fee arrangement shall apply to the transaction.

(H) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under this rule in a publication which is published more frequently than once per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under this rule in a publication which is published once per month or less frequently, the lawyer shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under this rule in a publication which has no fixed date for publication of a succeeding issue, the lawyer

shall be bound by any representation made therein for a reasonable period of time after publication, but in no event less than 90 days.

(I) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under this rule, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(J) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television or other communication medium in anticipation of or in return for professional publicity.

DR 2-104. Suggestion of Need of Legal Services.

(A) A lawyer who has given unsolicited advice to an individual to obtain counsel or take legal action shall not accept employment resulting from that advice, in violation of any statute or court rule.

(B) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment) or one whom the lawyer reasonably believes to be a client.

(C) A lawyer may accept employment which results from participation in activities designed to educate the public to recognize legal problems, to make intelligent selection of counsel or to utilize available legal services.

(D) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or

beneficiary thereof, to the extent and under the conditions prescribed therein.

(E) Without affecting the right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as the lawyer does not emphasize his or her own professional experience or reputation and does not undertake to give individual advice.

(F) If success in asserting rights or defenses of a client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

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No. 82-

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IN THE

Supreme Court of the United States

October Term, 1982

DONALD A. ALESSI and JOHN P. BARTOLOMEI,
Petitioners,

v.

COMMITTEE ON PROFESSIONAL STANDARDS,
THIRD JUDICIAL DEPARTMENT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Table of Contents.

	Page
Table of Contents	i
Table of Authorities	i
Preliminary Statement	1
Statement of the Case	2
ARGUMENT:	
I. Except for the proscription contained in the decision in Bates this Court has left to the state courts the right to regulate the use of direct mail by attorneys	5
CONCLUSION. For the foregoing reasons, the petition for a writ of certiorari should be denied	11

TABLE OF AUTHORITIES.

CASES CITED:

Bates v. State Bar of Arizona, 433 U. S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)	4, 5
Eaton v. Supreme Court of Arkansas, 607 S. W. 2d 55 (1980)	11
Friedman v. Rogers, 440 U. S. 1, 99 S. Ct. 987, 59 L. Ed. 2d 100 (1979)	10

Page

Greene v. Grievance Committee, 54 N. Y. 2d 118, 127, 128, cert. denied ____ U. S. ____, 72 L. Ed. 2d 153 (1982) 3,6

Koffler v. Joint Bar Association, 51 N. Y. 2d 140, 144, 145, n. 2, cert. denied 450 U. S. 1026 (1981) 6

Matter of R— M. J—, 455 U. S. 191, 102 S. Ct. 929 (1982) 5

Matter of State Bar Grievance Administration v. Jacques, 407 Mich. 26, 281 N. W. 2d 476, 477 (1979) 8

Ohralik v. Ohio State Bar Ass'n, 436 U. S. 447, 456, 459, 464, 98 S. Ct. 1912, 1918, 56 L. Ed. 2d 444 (1978) 5

State of Kansas v. Moses, 231 Kan. 243 10

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RESPONDENT'S BRIEF IN OPPOSITION.

Preliminary Statement.

Respondent's brief is submitted in opposition to the petition for a writ of certiorari, which is based on a decision of the New York Court of Appeals, entered on November 18, 1982. *Matter of Alessi and Bartolomei,* ____ N. Y. 2d ____. This decision sustained an order of

the Appellate Division of the New York State Supreme Court, Third Judicial Department, which found that petitioner had improperly solicited clients via direct mail. *Matter of Alessi, Bartolomei, Pedicone and Zablotny,* 88 A. D. 2d 1089 (3rd Dept. 1982).

Statement of the Case.

The petitioners Donald A. Alessi and John P. Bartolomei were the only New York attorneys who were partners in "The Legal Clinic of Cawley and Schmidt" (hereafter referred to as Clinic). The Clinic maintained offices for the practice of law in Buffalo, Rochester, Syracuse and Albany, New York, the latter being the only office of said Clinic in the Appellate Division, Third Department, State of New York.

During August and September, 1979, Linda A. Zablotny, a respondent in the disciplinary proceeding before the Appellate Division, Third Department, authored the letter involved in this matter and submitted it to both Alessi and Bartolomei who reviewed it, edited it and approved it for a bulk mailing from each of their four offices in the State of New York. Approximately one thousand letters were mailed to realtors from each of their four offices. The letter from their Albany office was signed by or on behalf of Henry Pedicone, Jr., Esq., the Clinic's attorney in Albany, by or with his consent and knowledge.

The respondent herein served a verified petition of charges with specifications and notice upon the petitioners herein and attorneys Pedicone and Zablotny.

By notice of motion dated June 3, 1981, and the affidavit of Richard G. Collins, Esq., attorney for the four

respondents in the disciplinary proceeding, sworn to June 29, 1981, a motion was made to dismiss the petition of charges. July 1, 1981, the Appellate Division, Third Department, adjourned the motion pending determination of the appeal in *Matter of Greene* by the Court of Appeals since the factual situation in both matters was basically identical. *Matter of Greene,* 54 N. Y. 2d 118 (1981), was decided October 29, 1981, and sustained an order of the Appellate Division, Second Judicial Department, finding Greene had improperly solicited clients via direct mail (cert. denied ____ U. S. ____, 72 L. Ed. 2d 153 [1982]).

January 15, 1982, the Appellate Division, Third Department, denied respondents' motion to dismiss the petition allowing the respondents to file and serve an answer within 20 days after service of a copy of the order to be entered thereon. Said order was entered January 15, 1982. The respondents made a motion for a stay to file and serve an answer until 20 days from the date of the determination by the United States Supreme Court of the petition for a writ of certiorari in *Matter of Greene.* Such stay was granted March 18, 1982. Certiorari was denied by this Court March 23, 1982, and respondents, through their attorney, submitted a verified answer dated April 9, 1982.

Respondents' answer in the disciplinary proceeding stated,

> "9. Since the conduct with which respondents are charged in the petition is *malum prohibitum* rather than *malum in se,* justice would be served by dismissal of the petition herein based upon this defense.

> "10. If the petition is not dismissed, justice would be served by this Court taking no disciplinary action against respondents based upon this defense."

By notice of motion dated May 14, 1982, returnable May 24, 1982, the respondents in the disciplinary matter moved for a reference for the taking of facts or "allowing the respondents to make further appearances in the proceeding to speak to the issue of possible sanctions if a reference were to be denied and for such other and further relief as (*sic*) may be just proper and equitable." The Appellate Division, Third Department, in a decision of June 22, 1982, determined a reference was unnecessary and found respondents guilty of misconduct "in permitting or approving the mailing of letters to realtors as alleged in the petition. However, since the letters were apparently sent in good faith and in reliance on *Bates v. State Bar of Arizona* (433 U. S. 350) and prior to the decision of the Second Department in *Greene* we determine that no sanction should be imposed for such misconduct." An order to that effect was dated and entered August 3, 1982.

Alessi and Bartolomei thereafter appealed to the New York Court of Appeals which on November 18, 1982, ordered "That the appeal be and the same hereby is dismissed without cost, by the Court *sua sponte* upon the ground that no substantial constitutional question is directly involved."

ARGUMENT.

I. Except for the proscription contained in the decision in *Bates*, this Court has left to the State Courts the right to regulate the use of direct mail by attorneys.

As is now widely recognized by the legal profession, the complete prohibition and ban on attorney advertising was modified by the decision of this Court in *Bates v. State Bar of Arizona*, 433 U. S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810, 1977. However, less recognized almost to the point of being ignored was the clear statement by this Court in *Bates* that its decision nevertheless was a narrow one. The Court emphasized that advertising by attorneys still could be regulated. *Matter of R— M. J—*, 455 U. S. 191, 102 S. Ct. 929, at 935, 946 and n. 11 (1982).

Further, this Court has defined its position relative to decisions restricting commercial speech noting "when dealing with restrictions on commercial speech we frame our decision narrowly, allowing modes of regulations [of commercial speech] that might be impermissible in the realm of non-commercial expression." *Ohralik v. Ohio State Bar Ass'n*, 436 U. S. 447, 456, 98 S. Ct. 1912, 1918, 56 L. Ed. 2d 444 (1978).

> "When the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven that in fact such advertising is subject to abuse, states may impose appropriate restrictions." *Matter of R— M. J—, supra*, at 937.

Subsequent to the *Bates* decision, the Court of Appeals, State of New York, decided on October 21, 1980, in an instance where an attorney had mailed two announcements, one to members of the general public and one to real estate brokers announcing availability and charges to handle real estate closings, the letter to the general public was permissible under *Bates* but specifically underlined that as to the letter to the real estate brokers the record before the Court was not adequate to render a decision (*Koffler v. Joint Bar Association,* 51 N. Y. 2d 140, cert. denied 450 U. S. 1026 [1981]). A fair inference to be drawn from the opinion was, in a similar case on a complete record, the Court would not condone such letter (*supra,* at pp. 144, 145, n. 2).

Thereafter, the Court of Appeals considered the propriety of an attorney mailing a letter to brokers announcing his availability to handle real estate matters and stating his fee. This time the Court of Appeals specifically found such mailing should be barred to prevent harm to the general public before such harm occurred because of the obvious element of the attorney's conflict of interest in representing a client solicited by the broker (*Greene v. Grievance Committee,* 54 N. Y. 2d 118, cert. denied ____ U. S. ____, 72 L. Ed. 2d 153 [1982]).

The *Greene* Court spoke to this conflict of interest at page 128 stating:

> "Nor as *Ohralik* makes clear" (and *Primus* confirms [436 U. S. at p. 434]) "is it required that there be 'actual proved harm to the * * * individual' " (436 U. S. at p. 464). "[T]he absence of explicit proof or findings of harm or injury is immaterial" (*id.* at p. 468); "The potential for overreaching

> * * * inherent in * * * in-person solicitation (*id.*) is enough to justify such a regulation."

The Court also noted at page 127:

> "There is, however, a substantial governmental interest in preventing conflicts of interest in attorney-client relationships which the statute directly protects and for which there is no adequately protective less restrictive alternative. The Supreme Court has many times recognized as a proper and substantial governmental interest the prevention of conflicts of interest. (*Matter of Primus,* 436 U. S. 412, 436 ['Serious likelihood of conflict of interest']; *Ohralik v. Ohio State Bar Ass'n,* 436 U. S. 447, 461, n. 19, *supra* ['we cannot say that the pecuniary motivation of the lawyer who solicits a particular representation does not create special problems of conflict of interest.'] and see *id.* at p. 464, n. 22; *N.A.A.C.P. v. Button,* 371 U. S. 416, 443 ['serious danger * * * of professionally reprehensible conflicts of interests which rules against solicitation frequently seek to prevent']).''

The pre-filing of such letters from attorneys to brokers would not overcome the conflict of interest problem inherent in the in-person solicitation of clients by brokers on behalf of the attorney.

The factual situation here is no different than that presented to the Court of Appeals in *Greene. Greene* assured the realtor he would save his client time and money. Petitioners' letter strikes the same tone beginning by stating "we recognize that the costs attendant to the sale or purchase of a home are a real concern to your clients that may

indeed influence whether the transaction will even take place." Who, if not the broker, is most interested in having prospective buyers and sellers in the hands of counsel who can "indeed influence whether the transaction will even take place"?

There is a latent danger in any third party coming between an attorney and a client whether this is a product of personal contact or by mail. While a mailing may be considered by some as less offensive than the personal contact, even the letter, as in this instance, directed to the brokers in such manner as to stimulate desire to foster commissions will also put these brokers in a position to overreach.

Although petitioners lean heavily on the 1979 Michigan decision in *Matter of State Bar Grievance Administration v. Jacques,* 407 Mich. 26, 281 N. W. 2d 469, the attention of the Court is directed to the dissenting opinion of Chief Justice Coleman who wrote:

> "The potential for overreaching or undue influence is substantial when the intermediary solicits the potential client in person. The intermediary may also be a professional, such as a sales person, trained in the art of persuasion." 281 N. W. 2d 476, 477.

The use of an intermediary who is not an attorney to solicit potential clients may also present other risks. The non-lawyer intermediary may be more likely to misstate the applicable law or the client's legal remedies, either through inadvertence, ignorance or on purpose, in attempting to persuade the client to employ a specific attorney. The intermediary may even attempt more extreme

and less ethical conduct than an attorney might use in soliciting clients because a non-lawyer intermediary might not feel bound to adhere to the standards incorporated in the Code of Professional Responsibility.

The use of personal intermediaries to recommend employment also would significantly increase the likelihood that the privacy of potential clients would be invaded. Allowing the use of intermediaries would increase the number of potential clients with whom an attorney could communicate. Moreover once certain attorneys employed intermediaries others might feel compelled to respond by using intermediaries. The privacy of all individuals would be likely to suffer as a result.

Finally, the potential for all these harms increases where the intermediary has or perceives he might have a personal interest in successfully soliciting clients.

Such in-person solicitation, like in-person solicitation by attorneys, "May exert pressure and often demand an immediate response, without providing an opportunity for comparison or reflection." *Ohralik, supra.* It is the presence of these factors which distinguishes this conduct from the advertising in *Bates, supra,* which simply approves access to "information and leaves the recipient free to act upon it or not." *Ohralik, supra,* 457.

Since the *Bates* decision State Courts, other than New York, have exercised jurisdiction concerning cases in which the issue of advertising and free speech have been before them.

Again, noting the *Matter of R— M. J—,* n. 12, page 936, "we foresee no obstacle to states dealing effectively

with this problem. The First Amendment as we construe it today, does not prohibit the state from insuring that the stream of commercial information flows cleanly as well as freely." In the same case, at 937, the Court stated: "thus the Court has made clear in *Bates* and subsequent Court cases that regulation—and imposition of discipline—are permissible where the particular advertising is inherently likely to deceive * * *"

Finally, in the same case somewhat similar to the Court of Appeals in *Koffler, supra,* the Court strongly implies on a proper record it well could sustain a disciplinary proceeding holding it would be deceptive for an attorney to emphasize in advertising he was licensed to practice before this Court. "Indeed such a statement could be misleading to the general public unfamiliar with the requirements for admission to the Bar." *Matter of R— M. J—, supra,* 939.

This Court has held the State of Texas could prohibit the use of trade names by optometrists (*Friedman v. Rogers,* 440 U. S. 1, 99 S. Ct. 987, 59 L. Ed. 2d 100 [1979]).

The Supreme Court of Kansas has held it improper for an attorney to utilize direct mail solicitation of a stranger for employment for a particular matter and made said attorney subject to discipline. *State of Kansas v. Moses,* 231 Kan. 243.

The Supreme Court of Arkansas has held it improper for an attorney to disseminate an advertisement listing a $10 initial consultation fee and a broad range of areas of law as the advertisement did not submit sufficient information to allow one in need of legal services to make an informed selection and additionally since it was disseminated in a packet with other advertisements all but three of

which were coupons for discounts the impression was created the attorney's offer was also a discounted fee. *Eaton v. Supreme Court of Arkansas,* 607 S. W. 2d 55 (1980).

The *Ohralik* case, 436 U. S. 447, 56 L. Ed. 2d 444, 98 S. Ct. 1912, made two statements which are of peculiar applicability herein. First, at page 459, it stated: "A lawyer's procurement of remunerative employment is a subject only marginally effected with First Amendment concerns. It falls within the state's proper sphere of economic and professional regulation."

The Court then went on to say: "The rules prohibiting solicitation are prophylactic measures whose objective is prevention of harm before it occurs." This is at page 464.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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